MAR 5 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 837

JOHN P. KINSEY, individually, and as a director and stockholder of Monroe Paper Products Company, and LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER CO., individually and as stockholders of said Monroe Paper Products Company,

Petitioners,

v.

BURTON S. KNAPP, CHARLES E. RANEY, GEORGE A. BLUM, DON B. LEATHERS and ARTHUR W. SEMPLINER, individually and as directors, officers and stockholders of Monroe Paper Products Company and as Trustees under a Voting Trust Agreement dated December 31, 1953,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1957

No.

JOHN P. KINSEY, individually, and as a director and stockholder of Monroe Paper Products Company, and LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER CO., individually and as stockholders of said Monroe Paper Products Company,

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Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Opinions in Courts Below

First Appeal

Kinsey et al v. Knapp et al (DC ED Mich., August 4, 1955), Lederle, Chief Judge. Not reported. Printed in Petitioners' Appendix to this petition, pages 2-116.

Knapp et al v. Kinsey et al (CA 6, May 1, 1956). Reported in 232 F 2d 458. Printed in Petitioners' Appendix to this petition, pages 117-132.

Knapp et al v. Kinsey et al (CA 6, July 19, 1956). Reported in 235 F 2d 129. Printed in Petitioners' Appendix to this petition, pages 133-135. Certiorari, only as to taxation of costs, denied, 352 US 892, 77 S Ct 131, 1 L ed 2d 86.

Second Appeal

Kinsey et al v. Knapp et al (DC ED Mich., July 30, 1957), Picard, District Judge. Reported in 154 F Supp 263. Printed in Petitioners' Appendix to this petition, pages 136-148.

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Knapp et al v. Kinsey et al and *Kinsey et al v. Knapp et al* (CA 6, January 31, 1958). Denial of rehearing. No opinion.

Statement as to Jurisdiction

The date, and the date of entry, of judgment sought to be reviewed and as to which certiorari is sought is December 6, 1957. The date, and the date of entry, of the order denying rehearing as to said judgment is January 31, 1958.

The statute believed to confer jurisdiction to issue writ of certiorari in the exercise of this Court's power of supervision pursuant to Supreme Court Rule 19(b) is 28 USC § 1651(a). The statute believed to confer jurisdiction on this Court to review the judgment by certiorari is 28 USC § 1254(1).

Questions Presented

I. Where the validity of a five year voting trust, fundamental to the further conduct of pending litigation and to the operations of the affected corporation, has been actively litigated before the federal courts for more than four years, has twice been held invalid by the District Court for violations of federal and state statutes and the trust will expire in less than one year, shall this Court's jurisdiction to review the validity of said trust be defeated or postponed and shall the invalidity of the trust become moot by reason of a second refusal of the Court of Appeals to pass upon the merits of the second partial final judgment?

II. Should the appellate power of this Court in respect of a partial final summary judgment determining that a voting trust agreement was invalid and unenforceable because the respondent voting trustees failed to register the voting trust certificates under The Securities Act of 1933 and under the Michigan Blue Sky Law, be defeated by the refusal of the Court of Appeals, on appeals from the judgment,[1] to pass upon the validity of the trust agreement and of the issuance of the voting trust certificates, and by its direction that all claims and counterclaims asserted in the litigation be first "heard and considered as a unit" by the District Court?

III. Did the Court of Appeals, by its refusal to pass upon or determine the issues of law presented by petitioners' motion for partial summary judgment and by its direction of trial of all issues in the action, deny petitioners the due process of law and the equal protection of the law guaranteed to petitioners by the Fourteenth Amendment to the Constitution of the United States, in view of the facts that—

(a) The validity and enforceabillty of the voting trust agreement, which will expire December 30, 1958, has been actively litigated in the federal courts by petitioners for almost four years and by partial final

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[1] *Knapp et al v. Kinsey et al*, and *Kinsey et al v. Knapp et al*, 249 F 2d 797, printed in accompanying Appendix, pages 149-161.

District Court judgments the agreement has twice been held to be invalid because of the failure of the respondent trustees to register the voting trust certificates issued under the agreement as required by the federal Securities Act of 1933 and the Michigan Blue Sky Law.[2]

(b) The Court of Appeals' decision directing that the case should be "heard and considered as a unit" and directing full trial thereof in the District Court means that all phases of petitioners' claims derivatively asserted against the respondent corporate officers and directors, and all claims asserted by petitioners in their own behalf against respondents individually and as fiduciaries, including petitioners' claim for multiple damages as to which respondents seek jury trial, and the counterclaim of the respondent directors against petitioners, must be heard and determined before the dispositive legal questions as to the validity of the voting trust agreement may be revewed or determined.

(c) Appellate review and determination of the issues of law presented by petitioners' motion for partial summary judgment and of the issues of law determined by the judgment are fundamental to the further conduct of the case and to the operation and management of the affairs of the corporation and to the rights of the stockholders for whose benefit the derivative portion of petitioners' action was brought.

(d) Due to the unresolved question as to the validity of the voting trust agreement, no meeting of the stockholders of the corporation has been held since September 1953 with the result that the respondents (being all of the officers and a majority of the directors of the company and also the sole trustees under the trust agreement) have not only remained in control of the corporation to date, but will remain in such con-

[2] The first judgment was reversed in *Knapp et al v. Kinsey et al* (CA 6), 232 F 2d 458, because of bias of the District Judge. Retrial before another judge was directed.

trol until the directed unit trial is had and all issues are determined. The voting trust will, or is almost sure to, expire before such determination can thus finally be made and important questions as to the right of respondents as fiduciaries of the company and of its stockholders, including petitioners, to occupy conflicting positions of trust will, to a prejudicial extent, become moot.

IV. When, pursuant to Rule 56(a), (c), (d) and Rule 54(b), Federal Rules of Civil Procedure, the District Judge entered a partial final summary judgment determining that the voting trust agreement was invalid because of respondent trustees' failure to register the voting trust certificates under The Securities Act of 1933 and the Michigan Blue Sky Law, should the District Judge have also held that, as a matter of law, the trust agreement was invalid because it violated the fiduciary duties and obligations of the respondent corporate officers and directors and also the federal and state statutes proscribing restraints of trade and price fixing and state statute and public policy as to restraints on alienation of property?

V. Do the mere allegations of an undetermined counterclaim of the respondents as individual stockholders and corporate officers and directors *but not as the voting trustees*, justify the refusal of the Court of Appeals to pass upon the questions of law determinative of the validity of the trust agreement, especially in view of the facts that:

(a) The District Judge expressly determined, persuant to the discretion vested in him by said Rule 54(b), that there was no just reason for delay and that partial final judgment should be entered determining the invalidity of the trust agreement and directing the holding of the long deferred stockholders meeting.

(b) The counterclaim was against petitioners only and not the corporation or its stockholders generally, did not involve the validity of the voting trust, and did not contest the fact that petitioner Kinsey was a director and stockholder and that the other petition-

ers were stockholders at the time they filed their derivative action on February 2, 1954 attacking the validity of the voting trust agreement because of violation of fiduciary duties and federal and state laws.

VI. Is the exercise of the discretion of the District Judge to grant a partial judgment under said Rule 54(b) reversible by the Court of Appeals except for an abuse of judicial discretion?

VII. Were not the duties and obligations assumed under the voting trust agreement by the respondent trustees, as a matter of law, in conflict with their fiduciary duties and obligations, as of all the officers and a majority of the directors of the corporation, to the corporation and to all of its stockholders, including petitioners?

VIII. Was not the voting trust agreement, which provided that for five years the individual owners of the majority stock in the corporation, respectively, would not sell their stock and that during said period the trustees under the agreement would have the sole power to sell such stock but could only sell all of it en bloc and for not less than $15 per share, a price fixing agreement and an agreement in restraint of trade prohibited by the federal and Michigan anti-trust and restraint of trade laws, and also contrary to public policy?

IX. Was not an offering of voting trust certificates, made to all but a few of the corporation's 430 stockholders, 60 residing in states other than Michigan, and admittedly accepted by more than 80% of all of the corporation's stockholders, as a matter of law a public offering requiring registration under The Securities Act of 1933 and the Michigan Blue Sky Law, especially when it was shown and not denied that some offerees had not understood the terms of the offering and some had lost contact with company affairs, and the respondent trustees made no claim other than that "most" of the offerees were local residents and they were "extensively informed regarding the company's affairs"?

X. In offering the voting trust certificates in interstate commerce and through the mails, did not the failure to disclose prior and continuing purchases of stock by and through the respondent officers and directors and the false statement that owners of 41114⅛ shares—approximately 44% of the stock necessary to effectuate the trust—

> "have signed the trust agreement previous to the time of starting the agreement sign-up campaign" (235b)

violate the Federal Securities Act of 1933 and 1934 and Rule X-10 B-5 of the Securities and Exchange Commission?

XI. Where the questions determinative of the *validity and enforceability* of the voting trust agreement are severable from the questions determinative of the other claims involved in petitioners' action and in the counterclaim, where for four years petitioners have actively prosecuted the questions in the federal courts and have been subject to great delay and expense as a result of a mistrial, and where the legal questions determinative of the validity of the voting trust arise and are determinable from the face of the documents and from the undisputed facts appearing in the depositions, sworn testimony during eight months of the former trial, approved findings of fact, admissions made by respondents and admittedly genuine instruments, should not the District Court's determination as to such validity and enforceability be granted appellate review before a further trial of other issues is required on the possibility that such trial *"may" bear on the kind of ultimate relief to be given if the trust is declared invalid*?

STATUTES AND RULES INVOLVED*
(Excerpts)

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STATEMENT OF THE CASE

Jurisdiction of District Court

The bases of jurisdiction of petitioners' action commenced in the District Court on February 2, 1954 were that the matter in controversy exceeded the sum and value of $3,000 exclusive of interest and costs and was between petitioners (as plaintiffs), all citizens of Connecticut, and respondents and Monroe Paper Products Company (as defendants), all citizens of Michigan, and arose out of the Sherman Anti-Trust Act, 15 USC §§ 1-7, and The Securities Act of 1933, 15 USC §§ 77a-77aa.[3]

In petitioners' Amended and Supplemented Complaint filed May 20, 1954, the foregoing bases of jurisdiction of the District Court were repeated and were augmented by adding that the action also arose out of the Clayton Act, 15 USC §§ 12-27.[4]

In petitioners' Supplement to Amended and Supplemented Complaint, filed May 4, 1955, petitioners asserted claims for treble and double damages under both the Sherman and Clayton Acts and the Michigan Restraint of Trade Law.[5]

The foregoing bases of jurisdiction were repeated in petitioners' Complaint As Amended and Supplemented, filed January 5, 1957.[6]

Facts

Alex Groesbeck, the longtime president and largest stockholder of Monroe Paper Products Company, died in March 1953 (Admission 8, see 20b, 131b). Shortly there-

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[3] Volume 1, Appellees' Appendix on first Appeal, No. 12676, page 2b.

[4] Volume 1, Appellants' Appendix on first Appeal, No. 12676, page 16a.

[5] Volume 1, Appellants' Appendix on first Appeal, No. 12676, pages 111-116a.

[6] Appellants' Appendix on second Appeal No. 13355, page 19a.

after respondent Knapp was elected as such president (Admissions 28, 44, 47, 48, see 33-34b, 131b, 134-135b).

In September 1953 the Groesbeck Estate secured an offer by National Container Corporation, made to all of the corporation's stockholders, to purchase not less than a majority, but up to all, of the stock in the corporation at $10 per share (Admission 181, see 45b, 177b; Deposition Exhibit 70, see 207b, 211b and Volume 1, Appellee's Appendix on first appeal No. *12,676*, page 146b). Respondents Raney, Blum and Leathers, then officers and directors of the corporation, defeated consummation of the offer by assembling $167,410, of which over $105,000 was solicited and obtained from waste paper and other suppliers, brokers, customers and others doing business with the corporation, with which funds there was purchased, through an escrow arrangement and for the benefit of the contributors, 15,538 shares of the corporation's outstanding 187,671 shares, at $10 per share.[1] This was done despite the corporation's "general policy", then reflected in a resolution by the stockholders, that the corporate officers purchase available stock at market prices for the corporation's treasury (Admission 7, see 20b, 131b; Approved Finding 8, see 315b; Minutes, Deposition Exhibit 1, see 207b, 211b and Volume IX, Appellants' Appendix on first appeal No. *12,676*, page 4095a. The proxies on the stock so purchased were sufficient to give respondents control of the September 23, 1953 stockholders' meeting (Minutes, Deposition Exhibit 1, see 207b, 211b, 220b; Admissions 250-256, see 53-54b, 131b).

At the September 23, 1953 annual meeting of the corporation, respondents Knapp, Raney, Blum and Leathers were re-elected, and defendant Sempliner was elected, five of the corporation's eight directors (Minutes, Deposition Exhibit 1, see 207b, 211b and Volume IX, Appellants' Appendix on first appeal No. *12,676*, page 4111a). Immediately

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[1] Approved Findings 21, 28, 30, 33a, see 316-318b; Admissions 233, 234, 244, 246, 250-257, 259-268, 270-307, 312-321, 324-334, see 51-59b, 131b, 166b, 179-182b; Exhibits 34, 73, 75, 86, 170, see 207b, 211b, 255-259b, 263b and Volume 1, Appellants' Appendix on first appeal No. *12676*, pages 301-303a.

thereafter Knapp, Raney and Blum were, by the directors, re-elected, respectively, President, Vice-President-General Manager, and Secretary-Treasurer, being all of the corporate officers (Minutes, Deposition Exhibit 1, unprinted, see 207b, 211b). No subsequent stockholders' meeting, or election of directors had been held because of inability to procure final court decision as to the validity of the voting trust, and said respondents have continued to hold such offices and control the corporation (Minute Book, Deposition Exhibit 1, unprinted, see 207b, 211b; Approved Finding 44a, see 320b) whose earnings of $449,000-$556,000, before taxes, during the three years ending June 30, 1953, have steadily declined to a loss of $79,382 for year ending June 30, 1956 (Admissions 21 and 717, see 30-31b, 103-105b, 131-132b) and further losses were sustained in 1957 (207-208a).

In October 1953 petitioner Waterbury Corrugated Container Corporation purchased approximately 40% of Monroe's stock, largely from the Groesbeck Estate, and petitioner Kinsey became one of the corporation's directors (Approved Finding 31, see Volume 1, Appellee's Appendix appeal No. *12,676*, page 391b).

On November 23, 1953 respondent Raney consulted a Detroit law firm, a member of which testified on the first trial that he prepared an inter-office memorandum of the conference stating (Italics added) that:

> "* * * management desires to consolidate its position and that of a majority of the stockholders by having such stockholders enter into some form of stockholders' deposit arrangement *whereby this block of stock can be held together with a view of negotiating the sale of such majority block intact at a favorable price.* There is concern that the large minority block of some 42% held by Waterbury might be readily augmented through purchases of another 9% at a price only slightly in excess of the $10 price which was offered to stockholders generally by both the opposition and the management in connection with the recent solicitation of proxies. Mr. Raney feels that the majority

block might be sold for from $15 to $18 per share. Our opinion is requested as to what type of stockholders' deposit arrangement might be entered into whereby the deposit by the stockholders of their shares might be solicited under an agreement to deposit the shares with a Stockholders' committee with blank assignments attached under an authorization to *sell the shares as part of a block if more than 50% of the outstanding shares are deposited at the most favorable price obtainable, but not less than, for example, $15 per share.*"

"Mr. Raney also had in mind that this solicitation might run over a period of many months and possibly past the date of the next annual meeting and accordingly he wanted to have a proxy for the next annual meeting deposited with the stock in each case, *although the primary purpose of the plan is not to solicit such proxies but rather consolidate the majority holding into a salable block for sale negotiation purposes.*

" 'Consideration was also given to the possibility of a Voting Trust, but it became apparent that again *the primary purpose of the proposal was not control as such but rather to have the majority shares deposited irrevocably for a definite period for the purpose of negotiation of a sale of the stock at not less than a certain minimum price.*

" 'In our opinion we are to discuss, comment and advise upon the proposed plan. Apparently it is intended that immediate action be initiated on this proposal and accordingly we are requested to expedite our opinion and have it in the mail before Thanksgiving if possible'."[1a]

On November 25, 1953 the law firm, by one of its members, gave its written opinion addressed to Raney as Vice-President and General Manager of Monroe (Admissions 358 and 359, see 2b, 166b; Trial Exhibit 224, see 272-277b). The opinion referred to the information received as to the

[1a]Trial Exhibit 223, see 209b, 211b, 269-271b; Testimony Stoetzer, see 392b; Admission 357, see 62b, 184b.

annual meeting, the Waterbury stockholding and possible additional purchases, the block of 54% favorable to "management" and stated (italics added) that:

> "and accordingly the management and many of the stockholders friendly to management feel that ultimately a sale of the controlling interest in the Company will be advisable provided a fair price is obtained for the stock, your thought being that the price should be between $15 and $18 per share as against the $10 price which was offered to stockholders generally about the time of the annual meeting."

The law firm recommended the creation of a voting trust.

In December 1953, the local attorney who had drafted the September escrow arrangement and who was one of the corporation's attorneys, after conferences with respondents, formulated the voting trust agreement dated as of December 31, 1953, and involved herein, and a letter of the same date to be sent to stockholders over the signature of Huber, chairman of the committee organized to solicit deposits of stock under the trust agreement and of which committee the law firm was counsel (Approved Finding 44a, see 320b; Deposition Exhibits 34A-D, see 243-246b). The trust agreement provided that the five respondents would be the sole trustees thereunder, and, inter alia, that:

(Italics added)

> "It is mutually agreed between the parties hereto as follows:
>
> "FIRST. Each party hereto holding shares of the capital stock of Monroe Paper Products Company to the number set opposite his, her or its name, as hereunto subscribed, respectively, hereby severally agrees to endorse and deposit said stock certificates forthwith, with sufficient transfers thereof in favor of the persons hereinbefore named as Trustees, with The Monroe State Savings Bank, of Monroe, Michigan, the Depositary hereunder, and to receive in exchange therefor voting trust certificates. * * *" (85a)
>
> "SECOND. Stockholders may also become subscribing parties to this agreement at the election of

the Trustees by depositing certificates for shares of the capital stock of the Company with the Depositary for transfer to the Trustees as aforesaid, all as provided in the preceding paragraph, and receiving voting trust certificates in return therefor, with identical effect as if said Stockholders had executed this agreement. * * *" (86a)

* * *

"EIGHTH. *During the period from the date hereof to and including the 30th day of December, 1958, Stockholders agree with each other and with the Trustees, and the Trustees accept the trust upon the condition of this agreement, that they will not sell their respective Company shares,* although they will be at liberty to deal with their voting trust certificates in the way of sale, pledge or otherwise, at all times and at any prices, as to them shall seem meet. (90a)

"NINTH. *During said period the Trustees shall have the exclusive power to sell said shares of stock; provided that no sale shall be made by said Trustee save of all the deposited shares in lump. No sale shall be made at a less price than at the rate of Fifteen Dollars ($15.00) for each and every share so deposited. The Trustees shall have sole discretion to determine the advisability or desirability of such sale, under the circumstances then prevailing and existing.* (90a)

"TENTH. In the event of a sale at any time during the period aforesaid, the net proceeds shall be deposited with the Depositary, which shall distribute the same to and among the holders of voting trust certificates upon the surrender thereof. Distribution shall be pro rata among the shares and there shall be no discrimination between holders in the distribution." (91a)

* * *

"TWENTIETH. This agreement may be executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute one and the same instrument. (94a)

"TWENTY-FIRST. This agreement and the trust, covenants, agreements and powers herein contained, shall be binding upon all parties hereto and depositors hereunder, their heirs, administrators, executors, successors and assigns, upon execution by Stockholders, or deposit with the Depositary hereunder, representing a majority of the presently outstanding capital stock of the Company, and shall continue in binding force and effect until December 31, 1958, unless sooner terminated by distribution under paragraph Tenth hereinabove. * * *" (94a)

The $15 minimum sale price fixed by the voting trust agreement was 50% above both the price at which the 15,538 shares had been purchased[2] and the market price then available to stockholders generally and at which defendants themselves solicited and purchased stock during the voting trust solicitation campaign.[3]

Although the Securities and Exchange Commission registration requirements had been considered by the corporation's officers, directors and stockholders in prior years, as was reflected in the corporate minutes (218-219b), the voting trust certificates to be issued under the voting trust agreement were admittedly not registered with the Commission nor accepted for filing or licensed under the so-called Michigan Blue Sky Law.[4]

On January 7, 1954 the five respondents, both through the mails and in interstate commerce and by means of a letter and enclosure which did not meet the SEC requirements for a prospectus, which did not disclose the escrow purchases of 15,538 shares at $10 made by and through respondents or respondents' intent to make additional purchases, and which contained the false list of alleged pre-

[2] Deposition Exhibit 75, see 207b, 211b, 258b.

[3] Trial Exhibit 122, see 265b; Deposition, Geuttler, Volume XIX, page 2761, unprinted; Deposition, Boudinet, see 324b; Deposition, Case, Volume XVII, pages 2477-2479, unprinted; Testimony, Raney, see 382-385b.

[4] Admissions 485, 486 and 487, see 72-73b, 132b; Approved Finding 42, see 319b.

signers and other incomplete and misleading statements as to the defeat of the National offer and the financial condition of the corporation, solicited all of Monroe's stockholders, other than petitioners and the other two directors, to join in the trust.[5] At the time, the corporation had over 430 shareholders, approximately 60 of whom resided outside of Michigan.[6] Thereafter a campaign to procure signatures and deposits of stock was conducted.[7] Respondents and their agents mailed two additional letters all stockholders and over 140 letters to individual stockholders soliciting signatures and deposits and offering to buy stock.[8] Interstate telephone calls were made and interstate telegrams were sent.[9]

On February 2, 1954 petitioner Kinsey as a director and stockholder, and petitioners Kunkel and Waterbury as stockholders, of the corporation, filed their complaint in the District Court of the United States for the Eastern

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[5] Admissions 432-449, see 67-69b, 131b, 185-186b; Deposition Exhibit 4, see 207b, 211b, 227-232b; Deposition Exhibit 9, Exhibit 1 to Complaint, see 84-96a; Deposition Exhibit 22, see 207b, 211b, 235b; Deposition Exhibit 28, see 207b, 211b, 239b; Trial Exhibit 23, see 208b, 212b, 264b; Approved Findings 47 and 47b, see 320b; Deposition, Guettler, see 341-344b, Volume XIX, pages 2719-2722, unprinted; Deposition, Boudinet, see 325-328b; Deposition, Weipert, see 329-330b; Deposition, Knapp, see 331-332b; Deposition, Leathers, see 332-333b; Deposition, Bl 335-337b; Deposition, McMahon, see 338b; Deposition, nann, see 339-340b; Admissions 250-256 and 717, see 53-54b, 104b, 131b; Deposition Exhibit 1, see 207b, 211b, 220b.

[6] Admissions 433 and 434, see 67b, 131b; Admissions 442, see 68b, 131b.

[7] Approved Findings 47b and 47c, see 320-322b; Admission 447, see 68b, 132b.

[8] Deposition Exhibits 2, 3, 20, 26, 27, see 207b, 211b, 224-226b, 233b, 237-238b; Admissions 475, 476, 478, 479, 482-484, 497, see 72b, 73b, 132b, 187b; Testimony, Boudinet, see 417-418b; Trial Exhibit 122, see 265b; Testimony, Raney, see 282-283b; Deposition, Seitz, see 344-349b.

[9] Approved Finding, 47b, see 320-321b; Deposition Exhibits 21, 25, 29A-C, 40, see 207b, 211b, 234b, 236b, 240-242b, 254b; Trial Exhibit 122, see 208b, 212b, 265b; Testimony, Raney, see 282-283b; Admissions 498 and 499, see 74b, 132b.

District of Michigan, Southern Division, as plaintiffs, against the five respondents, individually and as directors and stockholders of the corporation and as the trustees under the voting trust agreement, as defendants. The proceeding being primarily a derivative stockholders' action, the corporation was also named as a defendant.[10]

In brief, petitioners charged that, in violation of fiduciary duties to the corporation and its stockholders, the respondent officers-directors entered into a plan to obtain control of a majority of the stock in the corporation and to prevent the sale of any such stock during a period of five years without their consent. The alleged means employed by respondents were the declaration of an extraordinarily large dividend declared in October 1953 but payable in January 1954 in order to keep stockholders from selling their stock until the plan could be consummated and the creation of a voting trust agreement under which deposits of stock were facilitated by the misuse of a certain appraisal obtained at the corporation's expense and the promotion of a certain pension plan for the corporation's employees who, at its expense, solicited deposits of stock under the trust agreement. Petitoners also charged that the trust was unlawful and its consummation should be enjoined because the voting trust certificates had not been registered as required by The Securities Act of 1933 and the Michigan Blue Sky Law; that the soliciting letter was a prospectus not meeting the requirements of said Securities Act; that the trust agreement violated the Sherman Anti-Trust Act and the Michigan Restraint of Trade Law and the Michigan laws and public policy in respect of restraints on alienation of property. The complaint sought discovery and accounting as to misuse of corporate funds and facilities, declaratory judgment that the trust agreement was unlawful and in conflict with the fiduciary duties of the respondent directors-officers and should be enjoined and cancelled,

[10] The Complaint is printed on pages 2b-13b, Volume 1 of Appellee's Appendix on Appeal No. 12,676. A certified copy of said Volume 1 is being filed with this petition.

temporary and permanent injunction against carrying out the trust and soliciting deposit of stock thereunder, payment to the corporation for all loss and damage to it caused by respondents' wrongful conduct, and other appropriate relief. At the time petitioners' action was commenced respondents had secured deposit of, and had issued trust certificates as to, less than 40,000 shares of the 93,336 shares required to place the trust in operation. Certificates had not been issued as to any of the stock of respondents or their wives, except as to 375 shares owned by respondent Knapp.[11]

On February 18 and again on February 23, 1954, when petitioners sought temporary injunction, defendants agreed on the record that in lieu thereof the status quo would be maintained and no new voting trust certificates would be issued (361-365b). Notwithstanding, as soon as petitioners suspended the depositions of the trust officer of the trust depositary on March 9, 1954, respondents against began to issue voting trust certificates and to deliver them by mail. Between March 10 and March 17, 1954 such certificates were issued for the balance of the majority stock.[12] The depositary received requests from stockholders for return of some deposited stock, but returned none.[13] All except 263 of the 15, 538 shares purchased under the escrow were ultimately deposited under the voting trust (Approved Finding 47, see 320b). Without them the trust would lack a majority and, by its terms, not be binding (94a).

On March 2, 1954 respondent Raney secured an additional $45,000 from one of the corporation's suppliers of waste paper who, in September 1953, had furnished him

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[11] Admissions 472 and 510, see 71b, 76b, 167b, 188b; Trial Exhibit 187, see 266-267b; Deposition Exhibits 123 and 123A, unprinted, see 208b, 211b; Testimony, Boudinet, see 324b, 337b, 366-374b, 387-388b, and unprinted pages of testimony 3548-3550.

[12] Admission 510, see 76b, 188b; Trial Exhibits 262, 266, 296, 436b, see 286b, 292b, 294b, 306b; Testimony, Boudinet, 365-374b, 417-422b.

[13] Admissions 503, 504, see 74b, 132b; Trial Exhibits 434jj, 436A-B, 437B, see 304-307b.

$25,000 to buy stock through the escrow arrangement. With this money Raney had Seitz, a local broker, purchase additional stock in the corporation and trust certificates at $15 per share (Admissions 624, 627, 630, 631, 637-641, see 90-91b, 167b; Testimony, Seitz, see 344-349b; Testimony, Boudient, see 413-414b; Deposition Exhibit 145G, see 262b). Respondent Waterbury thereupon made purchases in competition with Seitz, buying both undeposited stock and deposited *stock* and the rights therein of the vendor stockholders who by reason of violation of the securities and other laws, were entitled to a return of their shares. Where Waterbury so purchased deposited stock the vendor stockholder executed, in duplicate, a demand upon the voting trustees and their depositary for a return of the stock, tendering return of the voting trust certificate which he endorsed in blank and delivered to the purchasing broker, and also executed an assignment to the purchasing broker of all rights to obtain return of the stock and of all rights and causes of action connected with the stock and demand.[14] One duplicate of the demand was sent to, and received by, the depositary as purchases were made.[15] The broker subsequently assigned to Waterbury (Trial Exhibits 483 and 484, see 210b, 213b, 313-314b).

Enlightened by discovery depositions,[16] petitioners, on May 20, 1954, filed their Amended and Supplemented Complaint[17] elaborating on the original charges by other allegations of misuse of the corporation's funds, facilities, etc., and charging that the existence of the escrow arrangement in September 1953 had been concealed from stockholders at the annual meeting in that month; that the unprecedented dividend payable January 15, 1954 was wrongfully declared; that the corporation's facilities and staff

[14] Deposition Exhibits 129, 130, see 207b, 211b, 261-262b; Trial Exhibits 445-482, see 210b, 213b, 308-312b; Deposition, Fleischman, see 231-234a and unprinted Volume V(i), page 1065.

[15] Testimony, Boudinet, see 411-413b, and unprinted pages 8539-8542; Trial Exhibits 434-434A-II, see 209b, 213b, 302-303b.

[16] Obstructions by respondents were overruled, see 1-5b.

[17] Volume I Appellants' Appendix, first Appeal No. *12,676*, pages 16-38a, a certified copy of which volume is being filed with this petition.

had been misused to solicit deposit of stock under the trust agreement; that excessive purchases of materials for the corporation had been from those who had contributed funds under the escrow arrangement, and that the state and federal statutes, previously referred to herein, as well as the Clayton Act, 15 USC §§ 1-27, had been violated by respondents. Accounting and other relief to the corporation was prayed.

In petitioners' Supplement to Amended and Supplemented Complaint,[18] filed May 13, 1955, plaintiffs claimed that in furtherance of the plan *after petitioners' action was commenced,* the respondent trustees had assured the Securities and Exchange Commission that they would file a registration statement as to the voting trust certificates and would offer the depositing stockholders an opportunity to obtain a return of their deposited stock, but that in further violation of the Securities Act respondent trustees had continued to receive deposits of stock under the trust agreement and to deliver voting trust certificates therefor by use of the mails and by means of transportation and communication in interstate commerce and, after thereby receiving deposit of a majority of the outstanding stock and having lulled the Commission into inaction, respondents had declined to file the registration statement, and that after petitioners' action was commenced respondents had induced one of the suppliers of waste paper to the corporation who had furnished funds to purchase a large amount of stock through the escrow arrangement to make available upwards of an additional $40,000 to buy up undeposited stock, and voting trust certificates issued under the trust agreement, in order to prevent sale of stock to petitioners or others, to prevent rescissions and demands for return of stock and to make stock available for deposit or redeposit under the agreement. The Supplement further alleged that, by reason of the foregoing and in order to protect its large investment previously made in stock of the corporation, and to prevent respondents from retaining

[18] Volume I Appellants' Appendix on first Appeal No. *12,676,* pages 111-116a.

the benefits of their wrongful acts, petitioner Waterbury had been compelled to purchase additional stock and the rights of stockholders who desired to demand, or had demanded, return of their deposited stock—at prices greatly in excess of the actual values of said stock and rights—and that Waterbury had thus acquired 6,837 additional shares and the rights of the holders of 11,797 deposited shares as to which the holders had demanded return. Waterbury prayed for the release of the 11,797 shares from the trust and Waterbury and Kinsey sought judgment for the damages respectively sustained by them, trebled under the Clayton Act or doubled under the Michigan law.

From February through September 1954 petitioners, respondents and the attorney for the corporation, took over 4,500 pages of discovery depositions during which 348 exhibits were introduced (Petitioners' Appendix to this petition, pages 135, 159).

Progressively through the month February-August 1954 respondents and/or the corporation unsuccessfully sought dismissal of the action or to strike allegations of the complaint. Answer to the original complaint with counterclaim was filed by the corporation on February 23, 1954. The other defendants did not answer until June 1954 when answers to the amended complaint and counterclaims were filed by the corporation and by the respondent officers-directors, the voting trustees filing answer without counterclaim (1-6b). The counterclaim by the corporation was abandoned during the trial (Trial Transcript, November 18, 1954, page 1,726). In general, the answer[19] of the respondent officers-directors denied misuse of the corporate funds and facilities and wrongful diversion of corporate opportunities to purchase stock and violation of the federal and state statutes in connection with the voting trust and alleged as special defenses that petitioners came into court with unclean hands and had no right to complain against the trust because not original participants therein, that the trust did not violate the Sherman or Clayton Acts nor the

[19] Volume I, Appellants' Appendix, first Appeal No. *12,676*, pages 76-92a.

Michigan restraint of trade law, and that the petitioners violated the Federal Trade Commission Act, The Securities Exchange Act of 1934 and Rule X-10B-5. The counterclaim[20] of said respondents asserted that petitioners were in a conspiracy to gain control of the corporation and thereby depress the value of the balance of its stock contrary to federal and state anti-trust and restraint of trade laws and in a manner violative of the Federal Trade Commission Act and the Securities Exchange Act and rule and the Internal Revenue Code. Respondents prayed for discovery and that petitioners be restrained from acquiring more shares and be ordered to dispose of their stock in lots of 5,000 shares, and that Kinsey be removed as director.

The answer of the respondent trustees[21] admitted the non-registration of the voting trust certificates, asserted that the voting trust agreement was valid, that no public offering of certificates had been made, that the soliciting letter of December 31, 1953 was accurate and adequate, and that petitioners had no legal standing sufficient to question or attack the trust.

Trial commenced in October 1954 before Honorable Arthur F. Lederle, Chief Judge, and continued to June 1955 (8-14b). On November 3, 1954 petitioners filed motion to dismiss the counterclaims of the corporation and of the respondent officers-directors and supported the motion by affidavit, deposition testimony and exhibits as a motion for summary judgment under the rule, whereupon the attorney for the corporation abandoned its counterclaim (8b; Trial Transcripts, November 4, 1954, pages 949-961, November 5, 1954, pages 1004-1008, November 18, 1954, pages 1723-1730, unprinted). The respondent officers-directors put into evidence in support of their counterclaim. On June 2, 1955 Mr. Sempliner, himself a respondent-director and the attorney for all the other respondent directors-officers, indicated his agreement that the matter of the voting trust should first be disposed of.

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[20] Volume I, Appellants' Appendix, first Appeal No. *12,676*, pages 92-100a.

[21] Volume I, Appellants' Appendix, first Appeal No. *12,676*, pages 52-55a.

"The Court: * * * Well, Mr. Sempliner, from your point of view, or what you are saying there, it would be advantageous, as you view it, to have a separate judgment using Rule 54. In other words, we would be able to get this issue settled so far as the voting trust agreements are concerned.

"Mr. Sempliner: That was my original motion, your Honor, before testimony was taken.

"The Court: All right. I think I got your point of view."[22]

On August 4, 1955 partial final judgment was entered determining that the voting trust was not for a lawful purpose within the Michigan Voting Trust statute[23] and was invalid because of the violations of the fiduciary duties of the respondent officers-directors and of federal and Michigan securities acts, and because of the fraudulent use of the mails. (Opinion, Petitioners' Appendix to this petition, pages 2-116). The Court also determined that the corporation was entitled to recover $306,982.62 as partial damages because of the misuse of corporate funds and facilities.

Respondents appealed, not seeking retrial, but seeking judgment in their favor (Appellants's Brief, Appeal 12676, pages i and 133). The appeal was argued in December 1955, and in May 1956 the Court of Appeals determined that the trial judge had evidenced bias or prejudice and remanded the case for new trial before a different judge, giving no decision on the questions of law *and no intimation that partial judgment, or partial judgment as to the validity of the voting trust, was improper* (Petitioners' Appendix to this petition, pages 117-132). Petitioners unsuccessfully sought rehearing and certiorari as to the imposition of over $11,000 appeal costs against them (No. 376,

[22]Volume VI, Appellee's Appendix, first Appeal No. *12,676*, page 230b, quoted in Petition of Appellees Cross Appellants for Rehearing And Supporting Brief, second Appeal Nos. *13,355-13,356*, pages 6-7.

[23]§ 450.34 Compiled Laws of Michigan 1948; § 21.34 Michigan Statutes Annotated.

October term 1956, 352 US 892, 1 L ed 86). The mandate was received by the District Court in August 1956 and in October the cause was reassigned to Honorable Frank A. Picard, District Judge. Meanwhile, in September 1956, based upon the facts developed by 4500 pages of deposition testimony, 10,000 pages of first trial testimony and proceedings, more than 800 exhibits, and approved findings agreed to during the original trial, petitioners propounded to respondents over 900 requests for admissions of facts (15b, 19-131b) as to which requests respondents completed their answers in February 1957 (16b). From November 1956 to June 1957 eight hearings, including two pretrial conferences, were held before Judge Picard. Petitioners consolidated their prior complaint and amendments into a Complaint—As Amended And Supplemented (19-77a), the corporation and voting trustees filed answers without counterclaim (unprinted and 98-126a) and the directors-officers filed answer incorporating their counterclaim (127-150a). On June 12, 1957 plaintiffs moved for partial final summary judgment granting injunctive relief as to the voting trust on the grounds that the undisputed facts established violation of the fiduciary duties of the respondent officers-directors and violations of The Securities Acts of 1933, The Securities Exchange Act of 1934, Rule X-10 B-5 of the Securities and Exchange Commission, the Michigan Blue Sky Law, the Michigan statute limiting voting trusts to those for lawful purposes, the Sherman Act, the Michigan restraint of trade statutes, and the Michigan law against perpetuities and restraints on alienation of property (165-173a). Two of defendants filed an opposing affidavit, which, on its face, did not comply with Rule 56(e) (174-181a). The Court gave opportunity to file further affidavit but none was filed (185a). The motion was argued June 26, 1957 and decided July 30, 1957 (17-18b, Opinion, Petitioners' Appendix to this petition,, pages 136-148). On August 1, 1957 partial final judgment was entered, again holding that the trust was invalid because of violations of the Securities Act of 1933 and the Michigan Blue Sky Law but holding inter alia, that as a matter of law the trust did not violate the federal or state re-

straint of trade laws or, on its face, respondents' fiduciary duties to the corporation or its stockholders (204-206a). Respondents appealed and petitioners cross appealed (Appeals Nos. 13,355 and 13,356; 209a, 215-216b).

The appeals were argued in October and decided in December, 1957. The Court of Appeals denied respondents' motion to dismiss the cross appeal, but again remanded the case to the District Court, expressly without prejudice as to any rulings made *and without passing upon or determining any of the questions of law as to the validity of the voting trust.* The District Court was directed to proceed in conformity with the view that

> "In the ultimate decision of this case, even if the trust is declared invalid, it may be advisable upon a full consideration of all the facts to give some different form of relief than what is now provided by the partial summary judgment. * * * we think it necessary that the case be heard and considered as a unit * * *." (Opinion, Petitioners' Appendix to this petition, pages 149-161).

Petitioners applied for rehearing on the grounds, inter alia, that the trust was for five years and had then been before the federal courts for four years and postponement of review as to its validity until trial of the entire controversy was, in practical effect, a denial of judicial relief as to it, was contrary to the Federal Rules of Civil Procedure and to this Court's decisions as to partial judgments, that the effect of the pendency of the counterclaim upon the propriety of partial judgment should be determined upon the uncontroverted facts as to the counterclaim and not upon its mere allegations, that the affidavit of the respondent trustees showed on its face that the Securities Act had been violated, that the questions of law raised by the appeal and cross appeal should be determined, and that any claimed inequity in granting immediate relief to petitioner Waterbury should not prevent the granting of immediate relief to the other stockholders of the corporation. Petitioners also directed attention to Mr. Sempliner's concurrence on the original trial, in the view, that the validity of

the voting trust should be determined by partial final judgment (Petition of Appellees-Cross-Appellants For Rehearing.

Rehearing was denied on January 31, 1958 without opinion. Stay of mandate was applied for by motion filed February 3, 1958, but no ruling has been yet made thereon.

There has been no stockholders' meeting since 1953 and respondents, by the successive stays of proceedings, refused by the District Court but granted by the Court of Appeals upon filing stay bonds, have been continued in control of the corporation and in possession of its majority stock.

ARGUMENT

Reasons for Allowance of Writ

I. Under the circumstances the decision of the Court of Appeals directing unit trial of all issues in the action and refusing to determine the questions of law presented by the appeals from partial judgment constitutes a denial of judicial process, contrary to the Constitution of the United States.

II. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III. The Court of Appeals has, without justification and with most serious resultant detriment to petitioners, the corporation and its stockholders generally, failed to accomplish the objectives of the Federal Rules of Civil Procedure, i. e.: to secure the just, speedy, and inexpensive determination of every action (Rule 1), to permit final and reviewable partial judgments in multiple claims actions (Rule 54(b)), and summary judgments upon a claim, irrespective of the pendency of a counterclaim (Rule 56(a)(d)), and has failed to determine questions of law fundamental to the further conduct of the case.

Two important questions are presented:

1. Are petitioners being denied constitutional judicial process and, if so, what can this Court do about it?
2. Were petitioners entitled to the partial summary judgment as a matter of law?

Denial of Judicial Process

The efforts of the petitioner Kinsey, as director[24] and the other two petitioners, also stockholders, to procure

[24] Under Michigan law a director has a statutory right to sue derivatively. § 641.5 Compiled Laws Michigan 1948, Volume 4, page 12,842; § 27.2395 Michigan Statutes Annotated, Volume 23, page 33. Monroe Paper Products Company is a Michigan corporation.

federal court decision as to the validity of the voting trust were commenced *before* solicitation for the trust was completed and while the violations of federal and state law were still being carried out and had not yet placed the trust into operation. They have been diligently prosecuted for four years. On two occasions two District Judges have determined that partial final judgment should be entered holding the voting trust invalid, compelling return of the deposited stock to the depositing stockholders and permitting the holding of a stockholders' meeting, none having been held since September 1953. The parties have once agreed in open court to the advisability of determining the validity of the trust by partial judgment before trying the other issues.

On the occasion of each of the two appeals the Court of Appeals stayed the effect of the judgment but refused to pass upon any of the legal questions decided by the District Judges. It has now directed that the case be "heard and considered as a 'unit'." The "unit" includes the claims of invalidity of the voting trust involved in the partial judgment and others, claims of other breaches of fiduciary duty and of mismanagement, claims for imposition of a constructive trust as to stock purchases made by respondents for themselves and for company suppliers, customers, brokers, et al., claims for accounting and for multiple damages, and the counterclaim of a conspiracy dating back to 1950 by persons not yet made parties and alleged to be in violation of the Sherman and Clayton Acts and Michigan law. The trust will expire December 30, 1958 and the inevitable practical effect of the second remand and direction will be that if the "unit" case must be tried, especially if partially by jury, no appellate review, especially by this Court, as to the validity and enforcement of the trust can be had before the trust will expire and its validity will become moot as to many of the issues. Meanwhile, for the entire five year life of the trust during which its validity will then have been before the federal courts, the respondents will have enjoyed the possession of the corporation's majority stock and the control of the corporate affairs which the trust was designed to give them.

It is respectfully contended that thus cementing the respondents into such control by refusal of the appellate court to pass upon the legal sufficiency of a judgment inimical thereto is, under the circumstances, a denial of due process of law and of the equal protection of law guaranteed to petitioners, the corporation and its stockholders generally, by the federal constitution. In principle, the situation does not differ from that reported in *Williams v. Simmons*, 355 US ..., 78 S Ct ..., 2 L ed 2d 87 in which, due to failure of the lower court to decide a controversy presented to it until after the officer involved had enjoyed the balance of his term and the points involved had become moot, this Court was preverted from exercising its appellate power.

Remedy

Inasmuch as this petition will be accompanied by petitioners' motion for leave to file Petition for Writ of Mandamus, it seems proper and expedient that we here discuss the power of this Court to grant appropriate relief, whether by certiorari, mandamus, or both. That such power exists appears to be unquestionable in view of the provisions of Article 3, § 2, cl.2, Constitution of the United States, the All-Writs statute 28 USC § 1651a, the certiorari statute 28 USC § 1254(1),[25] and Supreme Court Rule 19(b). The power is the same whether it be ascribed to the *exercise* of the constitutionally granted appellate power or to the *protection* of that power.

Forsyth v. City of Hammond, 166 US 506, 513, 17 S Ct 665, 41 L ed 1095, 1098, as to certiorari provision in the 1891 statute creating the Circuit Courts of Appeals:

> "* * * It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the court of appeals. It may be exercised before or after any decision by that court

[25] Under 28 USC § 1254(1) this Court may grant certiorari "before or after rendition of judgment" in the Court of Appeals.

and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the circuit court of appeals, and those classes of cases in which the decision of that court is declared a finality, and this court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination. * * *"

In the Matter of 620 Church Street Building Corporation, 299 US 24, 26, 57 S Ct 88, 81 L ed 16, 19, in speaking of the certiorari power under the All-Writs statute, this Court said:

"* * * That provision * * * affords ample authority for using the writ as an auxiliary process and as a means of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways."

Story Parchment Company v. Paterson Parchment Paper Co., 282 US 555, 567-568, 51 S Ct 248, 75 L ed 544, 551:

"* * * The entire record, however, is before this court with power to review the action of the court of appeals *and direct such disposition of the case as that court might have made of it upon the appeal from the district court.* (Italics added)

* * *

"The judgment of the Court of Appeals is reversed and that of the District Court affirmed."

This was also done in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 US 504, 71 S Ct 470, 95 L ed 483.

In *Barr v. Matteo*, 355 US ....., 78 S Ct....., 2 L ed 2d 179, this Court granted certiorari and remanded the case to the Court of Appeals to consider a question of qualified privilege which the Court had declined to pass upon.

The broad concept of this Court's appellate power is reflected in respect of mandamus and prohibition.

Ex Parte Republic of Peru, 318 US 578, 582, 63 S Ct 793, 87 L ed 1014, 1017, in which this Court granted leave to file a petition for writ of prohibition and/or mandamus restraining a district judge from further exercise of juris-

diction over a foreign vessel, notwithstanding the question presented was reviewable in the Court of Appeals.

> "• • • The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, *or of compelling it to exercise its authority when it is its duty to do so.* • • •" (Italics added)

Accord: *United States Alkali Export Association, Inc. v. United States of America*, 325 US 202, 65 S Ct 1120, 89 L ed 1554, 1560.

McCullough v. Cosgrove, 309 US 634, 60 S Ct 703, 84 L ed 992, in which the district judge was directed to vacate an order referring the cause to a master for trial, and to proceed to trial thereof without postponenment for trial of other cases not entitled to preference.

Ex Parte United States, 287 US 241, 53 S Ct 129, 77 L ed 283, in which mandamus was granted to compel the District Court to conform to an equity rule.

Petitioners recognize that the issuance of the extraordinary writs is discretional and that the power should be sparingly exercised, but petitioners urge that the unusual situation here involved justifies this Court in doing whatever it can to prevent further prejudice to petitioners and the corporation and its stockholders as a result of what is sincerely believed to be a denial of the judicial process. Nothing short of extraordinary remedy in this Court will produce any relief under the circumstances.

Partial Judgment

The record in the Court of Appeals on the appeal and cross appeal from the partial final summary judgment was complete. It consisted of the original district court files, the complete typewritten transcript of the discovery depositions and the deposition exhibits, the complete typewritten transcript of the testimony and proceedings on the

trial before Chief Judge Lederle and the trial exhibits, and the admissions subsequently made under Rule 36, FRCP. In addition there were on file in the Court the sixteen volumes of Appendices a and b on the first Appeal No. 12676[26] and Appendices a and b on the appeal and cross appeals Nos. 13355 and 13356.[27] The record was completely adequate for full review of the partial final summary judgment rendered in petitioners' favor by Judge Picard.

On their appeal from the partial final summary judgment (No. 13355) respondents raised the following questions: (1) was there a public offering of the voting trust certificates within the federal securities act, (2) was registration required under the Michigan Blue Sky Law, and (3) did petitioners acquire the right to set the trust aside by purchasing some of the trust certificates with notice and while their action was pending? Respondents claimed that question (1) was not answerable on a motion for summary judgment and ought to abide a trial on the merits, and that petitioners were debarred by purchasing certificates *after* their action had been commenced. On respondents' appeal, and on petitioners' cross appeal (No. 13356) petitioners raised the following questions: (1) was the issuance, sale and delivery of the voting trust certificates in violation of the Securities Act of 1933 and of the Michigan Blue Sky Law and should return of the deposited stock be required only for that reason or also (2) because of respondents' violations of the Securities Exchange Act of 1934 and Rule X-10B-5 thereunder, the Sherman Act and the Michigan laws and public policy relating to restraint of trade and of alienation of property, and of respondents' fiduciary duties as officers-directors?

The questions presented by the record as to the validity of the voting trust were and are forthright questions of law, the determination of which nowise depended or depends upon any of the questions raised by the retaliatory counterclaim filed by the respondent officers-directors, but not by them as respondent trustees under the voting trust agreement.

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[26] Volumes I and IX of Appellants' Appendix and Volume I of Appellees' have been certified to this Court.

[27] Nine copies of these Appendices are being filed with this petition.

Restraint of Trade—Price Fixing
Public Policy—Restraints on Alienation

It is undisputed that the majority of the directors and all of the officers of the corporation are the sole trustees under the voting trust agreement, which provides:

> "* * * from the date hereof to and including the 30th day of December 1958 Stockholders agree with each other and with the Trustees, and the Trustees accept the trust upon the condition of this agreement, that they will not sell ther respective Company shares although they will be at liberty to deal with their voting trust certificates in the way of sale, pledge or otherwise at all times and at any prices, as to them shall seem meet. During said period the Trustees shall have the exclusive power to sell said shares of stock; provided that no sale shall be made by said Trustees save of all the deposited shares in lump. No sale shall be made at a less price than at the rate of $15.00 for each and every share so deposited. The Trustees shall have sole discretion to determine the advisability or desirability of such sale, under the circumstances then prevailing and existing." (90a)

Either, on its face and as a matter of law, this is a price fixing agreement prohibited by the Sherman Act and by the Michigan restraint of trade statute or it is not.

Going beyond the face of the agreement, if that be necessary, it is undisputed that: defendants had previously purchased 15,538 shares at $10 for themselves and the corporation's suppliers, et al; they were purchasing at $10 and representing the market price to be $10 at the time the trust price of $15 was fixed and they were soliciting for the trust, and the purpose of the trust was to effect a sale advantageous to the depositing group rather than to attain a common benefit for the corporation and its stockholders generally (Facts, pages 12-29, ante).

Judge Picard held that, although the Sherman Act prohibits all price fixing irrespective of good intentions, the trust agreement did not fix prices within the intend-

ment of the Act because *United States v. Colgate & Company,* 250 US 300, 39 S Ct 465, 63 L ed 992 (quoted in *United States v. Bausch & Lomb Optical Co.,* 321 US 707, 722, 64 S Ct 805, 88 L ed 1024, 1034-5) permits a trader to exercise "*his own independent discretion* as to parties with whom *he* will deal [and to] announce in advance the circumstances under which *he* will refuse to sell." (Italics added) (193a) Petitioners contended that the District Judge erred in thus applying the principle that an owner of property, *by himself and not by agreement or in combination with other owners of other property,* may lawfully restrict the sale of his own property—to the restrictive price agreement herein executed by 80% of the owners of the corporation's stock. Such misapplication practically obliterates the Sherman Act and is contrary to the decisions of this court, followed in other courts.[28]

The tie-in features restricting sale to en bloc is directly contrary to *Black v. Magnolia Liquor Co.,* 355 US ....., 78 S Ct....., 2 L ed 2d 5. See also *Standard Oil Co. of California v. Moore* (CA 3), ...F 2d....., 26 Law Week, page 2261, December 3, 1957. Notwithstanding, the Court of Appeals made no determination of any of these questions so patently fundamental to the further conduct of the case (See 203a).

Somewhat inconsistently with his view that the agreement herein was not a price fixing agreement under the federal law, the District Judge held that the agreement did not violate the Michigan restraint of trade and price fixing law because, as he interpreted the Michigan decisions, that

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[28] *United States v. Bausch & Lomb Optical Company, supra; Frey & Son v. Cudahy Packing Company,* 256 US 208, 218, 41 S Ct 451, 65 L ed 892, 898; *United States v. McKesson & Robbins,* 351 US 305, 309, 76 S Ct 937, 100 L ed 1209, 1214-15; *United States v. New Wrinkle, Inc.,* 342 US 371, 377, 72 S Ct 350, 96 L ed 417, 425; *United States v. National Association of Real Estate Boards,* 339 US 485, 489, 70 S Ct 711, 94 L ed 1007, 1012-1013; *Gamco, Inc. v. Providence Fruit & Produce Bldg.* (CA 1), 194 F 2d 484, 487; *Masters, Inc. v. Sunbeam Corp.* (SD NY), 112 F Supp 268; *Newburgh Moire Co. Inc. v. Superior Moire Co. Inc.* (DC NJ), 105 F Supp 372, 374.

law had been judicially interpreted to permit *reasonable price fixing*. He cited two cases.[29] Neither involved any agreement or other concerted action by two or more persons. The first arose *before* the Michigan statute was adopted and involved a single owner's covenant not to compete with the purchaser of *his* business. The second involved a restriction imposed by a single vendor in a deed of *his* land. In neither did the restraint on trade exceed that which the single owner could impose by virtue of his own ownership of the property involved. The Michigan statute, Appendix to this petition, pages 171-173, is clear in its prohibitions as to contracts and combinations by two or more owners fixing prices or pooling their interests to affect prices and precluding unrestricted competition, and the Supreme Court of Michigan has enforced it.[30] Although the distinction between acts of a single owner and agreements of several owners were pressed in the briefs and arguments, the Court of Appeals did not rule on the question. Similarly as to the questions involving Michigan public policy against agreements perpetuating control of corporations for personal gain or in conflict with fiduciary duties[30a] and against restraints on alienation imposed for periods in gross.[30b]

Fiduciary Duties

Likewise, clear questions of law were and are presented whether the duties assumed by respondents as trustees

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[29] *Hubbard v. Miller*, 27 Mich. 14 (192a), and *S-K Oil Company v. Mac's Auto Mart, Inc.*, 329 Mich. 351.

[30] *Shambleau v. Hoyt*, 265 Mich. 560, 571; *Mulliken v. Naph-Sol Refining Co.*, 302 Mich. 410, 412-414; *Hunt v. Riverside Co-Operative Club*, 140 Mich. 538; *E. W. Smith Agency, Inc. v. Sanger*, 350 Mich. 75.

[30a] *Scripps v. Sweeney*, 160 Mich. 148; *Billings v. Marshall Furnace Co.*, 210 Mich. 1. Voting trusts are expressly limited to those for lawful purposes, see appendix to this petition, page 174.

[30b] § 554.51 C L Mich '48, § 24.49 MSA; *Loomis v. Laramie*, 286 Mich. 707; *Braun v. Klug*, 335 Mich. 691; *Gardner v. National Bank & Trust Co.*, 267 Mich. 270. The Trustees restricted power of sale is insufficient. See In re Dietz' Will, 42 NYS 2d 708 (Affirmed 41 NYS 2d 917).

under the trust agreement, particularly the duties to secure $15 per share solely for the *depositing* stockholders and to sell at that price only in lump, were not contrary to respondents' duties as officers-directors to act for the equal benefit of *all* of the stockholders and to purchase available stock at market prices for the corporation.[80c]

Public Offering

Respondents' affidavit of merit admits that "approximately 300 named individuals" were invited to join the trust (175a), that "more than 80% of all of the corporation's stockholders * * * affiliated themselves" with it (176a) and that "In this cause there is no issue of fact as to the text of the voting trust agreement or that the voting trust certificates were not registered under the Federal Securities Act nor validated by the Michigan Corporation and Securities Commission" (174a). The affidavit was signed solely by respondents Knapp and Raney, each of whom had testified shortly after the soliciting letters had been sent that they had no personal knowledge as to the mailing.[80d]

The undisputed facts as to the number of stockholders solicited, appearing in the depositions and testimony of those who handled the solicitation and in the exhibits and admissions are: the corporation had approximately 430 stockholders, of which at least 60 resided outside of Michigan and many of them had lost contact with company

[80c] *Pepper v. Litton*, 308 US 295, 306, 60 S Ct 328, 84 L ed 281, 289; *Ashman v. Miller* (CCA 6), 101 F 2d 85; *Seagrave Corp. v. Mount* (CA 6), 212 F 2d 389, 397; *Perlman v. Feldmann* (CA 2), 219 F 2d 173; *Zahn v. Transamerica Corporation* (CCA 3), 162 F 2d 36; *Irving Trust Co. v. Deutsch* (CCA 2) 73 F 2d 121; *Miner v. Belle Isle Ice Company*, 93 Mich. 97; *Scripps v. Sweeney*, 160 Mich 148; *Billings v. Marshall Furnace Co.*, 210 Mich 1; *L. A. Young Spring & Wire Corp. v. Falls*, 307 Mich. 69, 101, 102.

[80d] Deposition Knapp, February 17, 1954, Volume I, pages 68-69, unprinted; Deposition, Raney, May 6, 1954, Volume XIV, page 2035, unprinted; see, also, Testimony, Knapp, page 1186, unprinted and Testimony, Sempliner, page 5683, unprinted.

affairs (Admissions 433 and 434, see 67b, 131b); the first letter, dated December 31, 1953, solciting stockholders to join the trust was addressed to all stockholders on the stockholders' list and it was only those addressed to petitioners and two non-defendant directors, in any event not more than a "few," 'five' or 'less than a dozen,' that were not mailed; two subsequent related letters were mailed to all stockholders; over 140 additional letters were mailed to individuals, bringing the total mailings to almost 1,300; 375 trust certificates were delivered, largely by mail, and a number of interstate telephone calls were made and interstate telegrams sent and received (Facts, pages 18-19, ante). The trust agreement is open-ended (86a). See *Corporation Trust Co. v. Logan* (DC Del) 52 F Supp. 999.

In a Detroit conference with SEC representatives June 30, 1954, attorney Francis (who had filed answer and counterclaim for the corporation *contesting* the relief sought by petitioners) conceded, as did respondent Sempliner in respondents' presentation before the SEC in Washington on August 4, 1954, that the federal securities act had been violated; respectively contending that the violation was "techcal" and "inadvertent" and "unintentional[30e]. Respondents' affidavit of merits as to public offering merely states that:

> "* * * Most of them [the solicited stockholders] were residents of Monroe, Michigan or its vicinity. *They* were extensively informed regarding the Company's affairs. We were and are advised by counsel that under the circumstances here present the voting trust invitees were 'a limited class of informed persons able to mend for themselves,' *(S.E.C. v. Ralston Purina Company,* 346 U.S. 119 at 122) so that the transaction was not a public offering." (Italics added) (175a)

On oral argument of the motion for partial summary judgment, before Judge Picard, Mr. Ford, counsel for the respondent trustees, said:

"Now, to conclude what we were going to say about

[30e] Testimony, Hart, see 397b, 404-405b; Trial Exhibit 263, see 290-291b.

> a public offering, the cases, it seems to us, are not very helpful. We are left in the position where all we can say is we cannot tell whether this was a public offering or not, and we don't see how any court can except the United States Supreme Court itself, * * * (p. 186a)

We submit that the validity of respondents' claim of exemption because of alleged non-public offering was and is capable of decision on the undisputed facts.

Misrepresentation

Respondents also admit that: transmitted with the soliciting letter dated December 31, 1953 was a one page list entitled "Stockholders Who Have Signed The Voting Trust Agreement Prior To The Time Of Starting The Agreement Sign-Up Campaign." (Admissions 432, 434, 442, see 67-68b, 131b) This list featured the director-status of the respondents and the misrepresentation that owners of a total of 41,118⅛ shares (almost half of the amount required to place the trust in effect) had already signed the agreement (Deposition Exhibit 22, see 235b), whereas, in fact, none of the listed stockholders, other than respondents solely as trustees, had signed the trust agreement and none had deposited his stock (Petitioners' Requests For Admissions 444 and 445 and Responses, see 68b, 132b, 185b; Deposition, Guettler, see 343-344b; Deposition, Boudinet, see 325-328b; Deposition Blum, see 335-337b). One of those listed, the mother of respondent Sempliner and owner of 7,203 shares, never did sign an agreement or counterpart and did not exchange her stock for trust certificates until March 17, 1954, more than three months later (Deposition Exhibit 22, see 207b, 211b, 235b; Trial Exhibit 187, unprinted portion; Trial Exhibit 396, see 295b; Deposition, Boudinet, see 324b, 327-328b; and Trial Exhibit 262). Listees Edgar and Ruth Marvin never signed the agreement and never deposited their stock (Deposition Exhibit 22, see 235b; Trial Exhibit 187, see 266-267b; Testimony, Boudinet 388b). There is undisputed evidence that some of the stockholders who were solicited by mail did not understand the proposed transaction (Deposition Exhibits 20 and 26, see 233b,

237b) and that some of the provisions of the trust agreement, which a registration statement and a prospectus would have brought into the open, were not known to some of the trustees themselves (Testimony, Blum, see 333-334b and Hart, see 402b; Form, Trial Exhibit 1, unprinted).

There is no non-public offering exemptions in the federal securities act as to misrepresentations or misleading omissions in a prospectus such as the soliciting letter dated December 31, 1953 (15 USC § 77q, Rule X-10 B-5. A proper registration statement[31] and prospectus would also have required disclosure of the stock purchases made by the trustees and suppliers, etc. through the escrow arrangement and of the intent to deposit such stock under the voting trust agreement as approximately one-sixth of the majority stock required to make the trust effective. The escrow and its results were not referred to in the soliciting communications and, in fact, the December 31st letter misrepresented that the prior National Container offer had been defeated by a rallying of the stockholders to the management and that the group to be benefited by the trust was those who had given proxies to management for the September 1953 meeting, whereas it was the purchases of stock made through the escrow arrangement that had enabled respondents to defeat the National offer and control the September meeting and the trust would to a large extent benefit respondents, suppliers, and others who had made the escrow purchases (Facts, pages 13-16, 18, ante).

Right to Sue

Petitioner Kinsey, a director and stockholder, and petitioners Waterbury and Kunkel as stockholders, in February 1954, sued on behalf of the corporation and its stockholders generally and on their own behalf to prevent consummation of the trust. This was before respondents' continued misconduct made it necessary that Waterbury *subsequently* purchase additional stock and rights therein. Petitioners unquestionably had the right to seek such relief.

[31] Form, Trial Exhibit 1, unprinted.

Non-participating stockholders may challenge a voting trust.[32] Under Michigan statute a director or a stockholder may sue derivatively (§§641.3, 641.5 CL Mich. '48; §§ 27.2393, § 27.2395 MSA. [33] The anti-trust laws gives any person harmed or threatened a right to sue (15 USC §§ 15 and 26). Derivative actions may be maintained. *General Investment Company v. Lake Shore & Michigan Southern Railway Company*, 260 US 261, 43 S Ct 106, 67 L ed 244; *General Investment Company v. N. Y. C. Railroad Co.*, 271 US 228, 46 S Ct 496, 70 L ed 920. An individual who is not a member of the offending group but is threatened with damage, may sue. *Anderson v. Shipowners Association of the Pacific Coast*, 272 US 359, 47 S Ct. 125, 71 L ed 298. The purpose of the act is to sweep away restraints on free trade, and private suits are encouraged as an enforcement aid. *United States v. Yellow Cab Co.*, 332 US 218, 67 S Ct 1560, 91 L ed 2010; *Maltz v. Sax* (CCA 7), 134 F 2d 2; *Quemos Theatre Co. v. Warner* (DC NJ) 35 F Supp 949; *Weinberg v. Sinclair Refining Co.* (DC NY) 48 F Supp 203.

The Securities Act of 1933, 15 USC § 77p, provides that "the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." Similarly as to the Securities Act of 1934, 15 USC § 78bb, and it is abundantly established that when a statute renders conduct unlawful, equity will furnish an appropriate remedy. *Bell v. Hood*, 327 US 678, 66 S Ct 773, 90 L ed 939; *Federal Communications Commission v. American Broadcasting Company, Inc.*, 347 US 284, 74 S Ct 593, 98 L ed 699; *Brotherhood of Railroad Trainmen v. Howard*, 343 US 768, 72 S Ct 1022, 96 L

[32] 5 Fletcher, Cyclopedia Corporations, § 2086, pages 386, 388-389; *Consolidated Textile Corporation v. Dickey* (CCA 5), 269 Fed 942; *Mannheimer v. Keehn*, 41 NYS 2d 542; *Herman v. Dereszewski*, 312 Mich. 244.

[33] § 641.3 gives the chancery court jurisdiction over corporate directors, managers and officers. § 641.5 provides that such jurisdiction may be exercised on bill or petition "at the instance of any director, trustee or other officer of such corporation having a general superintendence of its concerns, or by any stockholder of such corporation."

ed 1283; *Deckert v. Independence Shares Corp.*, 311 US 282, 287-290, 61 S Ct 229, 85 L ed 189, 194-195; *Glover v. Malloska*, 238 Mich. 216; *Kardon v. National Gypsum Co.* (ED Pa), 73 F Supp 798, 802-803; *Corporation Trust Co. v. Logan* (DC Del), 52 F Supp 999, 1003; *Fischman v. Raytheon Mfg. Co.* (CA 2), 188 F 2d 783. Moreover the Securities Exchange Act of 1934, § 78cc and the Michigan restraint of trade law expressly provide that contracts in volation are *void*. The other statutes involved are silent as to legal effect, but it is generally held that when a statute prohibits conduct and provides criminal penalties for violation, the prohibited conduct is void even though the statute does not expressly so declare.[34] Such has been held as to contracts expressly prohibited by The Securities Act of 1933, i. e., the sale of an unregistered security, as distinguished from contracts *merely related* to those prohibited.[35] Again, it is to be noted that petitioners' action was to *prevent consummation* of the voting trust and was seasonably and promptly instituted.

Suit having been brought *before* the trust was consummated, the real question is not whether it would be void or voidable had it been consummated, but whether a court of equity should enjoin consummation under the circumstances. The court's power is not diminished by respond-

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[34] *United States v. Trans-Missouri Freight Association*, 166 US 290, 341, 17 S Ct 540, 41 L ed 1007, 1027; *Waskey v. Hammer*, 223 US 85, 94, 32 S Ct 187, 56 L ed 359, 364; *Bayer v. Jackson City Bank & Trust Company*, 335 Mich. 99, 105; *Jaenicke v. Davidson*, 290 Mich. 298, 304; *Edwards v. Ioor*, 205 Mich. 617, 625; *Turner v. Schmidt Brewing Co.*, 278 Mich. 464; 469-470 (liquor law); *Endres v. Mara-Rickenbacker Co.*, 243 Mich. 5 (motor vericle law); *Thompson v. Cain*, 226 Mich. 609, 612-613 (blue sky law); *Maurer v. Greening Nursery Co.*, 199 Mich. 522 (partnership assumed name law); *Ferle v. City of Lansing*, 189 Mich. 501, 506 (self-dealing); In re Reidy's Estate, 164 Mich. 167, 173 (pharmacy law); *Cashin v. Pliter*, 168 Mich. 386, 389 (assumed name law).

[35] *Corporation Trust Co. v. Logan* (DC Del), 52 F Supp 999, 1003; *Kaiser-Frazer Corp. v. Otis & Co.* (CA 2), 195 F 2d 838, cert. den. 344 US 856, 73 S Ct 89, 97 L ed 664. and Loss. Securities Regulation, p. 1071.

ents having secured possession of the majority stock *after* the action was instituted.[38]

As to all of the foregoing bases of right of petitioners to relief, the Court of Appeals said nothing, despite the fact that the points were briefed and argued to it by petitioners' counsel.

In April 1954, under the pressure of continuing misconduct by respondents, Waterbury *purchased some of the stock and rights to its return* of other stockholders who had deposited their stock under the trust and who had demanded its return, tendering back the illegally issued trust certificates (Facts, pages 21-22, ante). As to these purchases the amended complaint alleged Waterbury's resultant right to return of the deposited stock (73a). The District Judge expressly determined that petitioners were proper parties to secure this relief, citing *Traer v. Clews*, 115 US 528, 6 S Ct 155, 29 L ed 467.

The Court of Appeals, ignoring all asserted bases for relief, treated petitioners' right to sue as of it were based solely on the statutory right of rescission given to the depositing stockholders by The Securities Act of 1933. This was despite the facts that Waterbury did not, as transferee, attempt to enforce any such statutory right of rescission, merely sought return of deposited stock for which the depositors had made prior demand and had sold to Waterbury *in violation and repudiation of the provisions of the trust agreement* and as to which stock Waterbury's prayer for return was merely cumulative of the relief originally sought on behalf of the corporation and all of its stockholders. The error was specifically brought to the attention of the Court of Appeals by the petition for rehearing, as was the seemingly obvious fact that "any claimed inequity in granting immediate relief to Waterbury should

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[38] *Porter v. Lee*, 328 US 246, 66 S Ct 1096, 90 L ed 1199, 1203; *Jones v. Securities and Exchange Commission*, 298 US 1, 56 S Ct 654, 80 L ed 1015; *Texas & New Orleans Railroad Company v. Northside Belt Railway Company*, 276 US 475, 48 S Ct 661, 72 L ed 661; *Deckert v. Independence Shares Corp.*, 311 US 282, 287-290, 61 S Ct 229, 85 L ed 189, 195.

not prevent the granting of immediate derivative relief to the corporation's other stockholders."

Review of Partial Judgment

It cannot be claimed that the Court of Appeals reversed the partial judgment because of an error of law committed by Judge Picard in determining the invalidity and unenforceability of the voting trust. The Court did not review any such question, but planted its decision on an entirely extraneous theory, i. e. the *possibility or speculation* that some sort of relief *might* be granted on the counterclaim of the respondent officers-directors or that possibly the statute of limitations might bar *Waterbury* from a statutory action for return of the stock which it had purchased *after its action was commenced*. To put it squarely, the Court of Appeals, without reviewing or considering the merits of the appeals, substituted its own ideas for the judicially exercised discretion of Judge Picard as to the advisability of first adjudicating questions of law that were fundamental to the further conduct of the case. In this respect we contend that the Court of Appeals ran counter to the objectives of Rules 1, 52(a), 54(b), and 56(a), (c), (e), Federal Rules of Civil Procedure, and to the principle that an appellate court should not reverse an exercise of judicial discretion by a lower court except for an abuse thereof.[37]

Judge Picard made the express determination required by Rule 54(b) that "there is no just reason for delay." His primary concern was the plight of the corporation and the effect of its inability to hold an annual stockholders meeting since 1953. He was informed of the devastating decline in the earnings of the corporation while respondents continued in control. He found that the respondents were wrongdoers and that some immediate relief was impera-

[37] *Continental Illinois National Bank & Trust Company of Chicago v. Chicago, Rock Island & Pacific Railway Company*, 294 US 648, 677, 55 S Ct 595, 79 L ed 1111, 1128; *Burns v. United States of America*, 287 US 216, 222-223, 53 S Ct 154, 77 L ed 266, 270.

tive if they were not to continue enjoying the fruits of their misconduct. Said he:

> "This is a court of equity. For failing to comply with the law should defendants be rewarded for their wrong doing or condemned with nothing but a verbal chastising? We don't believe so." (200a)
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> * * *
>
> "In other words, we believe that a free election as near as we can have it, for the directors and controlling officers of this corporation should be held at the annual meeting, notice of which shall be given according to the by-laws by the proper officers so that perhaps this corporation may find an end to its troubles.
>
> "The above constitutes a partial judgment in this case at the present time chiefly as provided in Rule 54(b). We intend it to be appealable and determine there is no just cause for delay in having these issues finally settled." (201-202a)

The decision of Judge Picard was squarely within, and the action of the Court of Appeals was squarely contrary to, the decisions of this Court.

Sears, Roebuck & Co. v. Mackey, 351 US 427, 435-437, 76 S Ct 895, 100 L ed 1297, 1306-1307:

> "To meet the demonstrated need for flexibility, the District Court is used as a 'dispatcher.' It is permitted to determine, in the first instance, the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal."
>
> * * *
>
> "Also, it cannot well be argued that the claims stated in Counts I and II are so inherently inseparable from, or closely related to, those stated in Counts III and IV that the District Court has abused its discretion in certifying that there exists no just reason for delay. They certainly *can* be decided independently of each other."
>
> * * *
>
> "* * * But the District Court *may*, by the exercise

of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reason for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals."

Cold Metal Process Company v. United Engineering & Foundry Company, 351 US 445, 452, 76 S Ct 904, 100 L ed 1311, 1317-1318:

"* * * The amended rule, in contrast to the rule in its original form, treats counterclaims, whether compulsory or permissive, like other multiple claims. * * * Therefore, under the amended rule, the relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion. If the District Court certifies a final order on a claim which arises out of the same transaction and occurrence as pending claims, and the Court of Appeals is satisfied that there has been *no abuse of discretion*, the order is appealable." (Italics aded)

The issues on the counterclaim herein are so severable from the legal issues supportive of the partial judgment as not to require precedent unit trial. As was said by Mr. Justice Frankfurter in *Swift & Company Packers v. Compania Colombiana Del Caribe*, S.A., 339 US 684, 689, 70 S Ct 861, 94 L ed 1206, 1210-1211:

"* * * Under these circumstances the provision for appeals only from final decisions in 28 USCA § 1291 * * * should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process."

The error committed by the Court of Appeals, in substituting for the exercised judicial discretion of the District Judge, ideas based upon matters aliunde the points of law

upon which the partial judgment was based and without review thereof, is patent and, it is submitted, calls for and is susceptible to correction by this Court under the circumstances.

Conclusion

For the reasons hereinbefore set forth, which disclose the gravity of the situation resulting from the refusal of the Court of Appeals to give its timely decision on the legal questions determinative as to the validity, invalidity and unenforceability of the voting trust agreement and leaving the District Judge without appellate guidance as to such questions on the retrial, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Dated February 27, 1958.